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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

79-99

LYNDA TREDWAY, Petitioner

v.

DISTRICT OF COLUMBIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA
COURT OF APPEALS

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Petitioner Lynda Tredway asks that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in this case on June 19, 1979.

CITATIONS TO OPINIONS BELOW

The Opinion and Order of the Superior Court of the District of Columbia are unreported and are printed in Appendix B, p. 1-b. The Opinion of the District of Columbia Court of Appeals, printed in Appendix B, p. 7-b, is unreported.

JURISDICTION

The Judgment of the District of Columbia Court of Appeals was entered June 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether petitioner, a former school teacher, must apply to the Secretary of Labor for compensation under the Federal Employees' Compensation Act prior to instituting a tort action against the District of Columbia for injuries resulting from her being raped in her classroom by non-student intruders.

   a. Whether the injuries suffered by petitioner come within the Federal Employees' Compensation Act.

   b. Whether there is a substantial question that petitioner's injuries arose out of her employment.

STATUTE INVOLVED

This case involves questions concerning the coverage and exclusivity of the Federal Employees' Compensation Act (FECA), 5 U.S.C. §8101 et seq., particularly sections 8101(5), 8102(a) and 8116(c). These sections are printed in Appendix A.

STATEMENT OF THE CASE

This case arose out of an especially horrible crime that occurred at about 3:15 p.m., on May 5, 1975. Petitioner, Lynda Tredway, then a teacher at a public high school in the District of Columbia, was alone in her classroom after formal class had ended at 3:00 p.m. She had remained in her room to aid a student, and she had just begun to grade student papers.

At approximately 3:15 p.m., two male strangers, who were neither students nor employees of the school, entered the classroom, locked the door, and tied and gagged the petitioner. They assaulted petitioner with a knife, robbed her and raped her repeatedly. Despite her cries, no one came to petitioner's aid. Immediately after her assailants departed, petitioner freed herself and sought help. Subsequently, her assailants were captured and convicted.

On December 11, 1975, petitioner filed a complaint in the Superior Court of the District of Columbia, alleging that the attack was a direct result of respondent District of Columbia's negligence in failing to provide petitioner with safe working conditions under circumstances in which respondent knew, or should have known, of the dangers to which petitioner was exposed. Similar attacks had occurred

previously, and a school guard who had been hired to be there then was absent when this attack took place. As a result of this attack, petitioner suffered substantial injuries, humiliation, embarrassment, and pain, and she incurred considerable expenses for necessary legal assistance and medical and psychological treatment.

On March 11, 1975, respondent filed a Motion for Judgment on the Pleadings, based on the argument that petitioner's sole remedy was under FECA. On December 28, 1977, the trial court granted respondent's motion and dismissed the complaint. The trial court held that "a 'substantial question' of coverage under FECA has been raised... and therefore the Secretary of Labor must have the first opportunity to speak on the applicability of FECA."

Petitioner appealed this ruling to the District of Columbia Court of Appeals. Petitioner argued that she should be allowed to proceed with her tort suit against respondent because:

1. the injuries she suffered were not contemplated for coverage under FECA; and

2. there was no substantial question that her injuries did not arise out of her employment as a teacher.

On June 19, 1979, the Court of Appeals ruled against petitioner on both grounds, and affirmed the ruling of the trial court. The Court of Appeals held that FECA applied to the type of injuries suffered by petitioner, and that there was a causal connection between petitioner's employment as a school teacher, and her being raped by non-student intruders.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to answer two fundamental questions concerning the scope of FECA, an important Federal statute:

1. whether certain of the harms suffered by petitioner — humiliation, embarrassment and mental anguish — are within the scope of the Act; and

2. whether the incident that caused the injuries — petitioner's being raped by non-student intruders — arose out of her employment as a teacher.

In deciding this case, the Court can establish a clear standard for determining when an injured employee may proceed

in tort against her employer, without first filing a claim for compensation with the Secretary of Labor.

I. This Court never has addressed directly whether particular kinds of injuries, by their very nature, are not within the purview of FECA. However, in Mason v. District of Columbia, 395 A.2d 399 (D.C. App. 1978), the District of Columbia Court of Appeals considered this question, and held that certain types of "mental suffering" were not "injuries" as that term is used in FECA. The Court stated that an employee could bring a negligence claim involving harm of that kind without first filing a FECA claim.

The employee in Mason filed suit in court for assault, battery, false arrest and false imprisonment, based on her having been arrested while at work. Her damages were based on the mental suffering, humiliation and embarrassment she suffered because of her being arrested. The District of Columbia sought to dismiss the complaint, arguing that the employee's sole remedy was under FECA.

In its ruling, the Court of Appeals focused on the Act's definition of "injury", which "includes in addition

to injury by accident, a disease proximately caused by the employment and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices..." 5 U.S.C. §8101(5). The Court held that "'humiliation' and 'embarrassment' claimed by [the employee] to have caused 'mental suffering' in the instant case would not be within the ambit of FECA and hence she could not recover these damages under FECA." The Court allowed the employee's tort suit to proceed without first having her attempt to recover under FECA.

Petitioner's case presented the Court of Appeals with circumstances almost identical to those in Mason -- an incident not within the traditional notion of a work-place accident, and harm of the type not contemplated by FECA. However, instead of focusing on the nature of the injuries petitioner suffered and deciding that they were not within the scope of FECA (as the Court did in Mason), the Court of Appeals ruled that FECA applied to the incident out of which the injuries arose. The Court ruled that FECA applied to assaults, and that therefore petitioner had to file her claim with the Secretary of Labor.

It is necessary for the Court to hear the present case in order to clarify the concept addressed by the

Court of Appeals in Mason. Petitioner thinks that the principle of Mason is correct: that certain injuries are not contemplated by FECA, regardless of the incident out of which the injuries arose. This principle applies to her case, and petitioner should be allowed to proceed in tort against respondent.

Although FECA reflects important social policies and needs, it simply does not encompass every type of harm suffered by an employee. The mental agony petitioner suffered clearly is not the type of "injury [caused by] accident or disease" Congress had in mind in passing FECA.

The policies behind workmen's compensation laws — sharing the risks of workplace, work related injuries, and expediting claims for injuries on the job — are wise and useful ones. They have nothing to do with claims arising out of a savage rape of a teacher by strangers, irrespective of its fortuitous happening on her work premises. Such a criminal act had nothing to do with her job, and her employer's insistance on limiting petitioner's remedy to a workmen's compensation claim is a bitterly ironic attempt to limit her claim for the damages she clearly and horribly sustained.

For these important reasons of policy and law, the decision of the Court of Appeals in this case should be reviewed by this Court, and the judgment should be reversed.

II. The second issue raised by petitioner is whether there was a sufficient connection between her employment and her being raped, to raise a substantial question as to the applicability of FECA. In order for petitioner to be entitled to relief under FECA, her injury must have been sustained "while in the performance of [her] duty." 5 U.S.C. §8102(a).

These words are a term of art in the law and they have had a clear and definite interpretation by the state courts interpreting state workmen's compensation laws and by the Employees' Compensation Appeal Board[1/] interpreting the same phrase in the federal statute. The precise

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1/ Claims for compensation under FECA are processed by the Department of Labor, and most administrative actions in this area are not subject to judicial review. 5 U.S.C. §8128. As its name suggests, the Employees' Compensation Appeals Board is the appellate-level review board for claims under FECA. See Federal Personnel Manual, Chapter 810, §5-15 (1975).

meaning of this term should be gleaned from all those cases and applied to the present situation. When that is done, it is clear that petitioner's claim here is not based on any injury which arose "in the performance of her duty" as a high school teacher as that term has been applied consistently and uniformly in the courts of this country.

A. The Federal Statute and Decisions

The decisions of the ECAB that interpret 5 U.S.C. §8102(a) hold that in order for an injury to be compensable under FECA, two tests must be met: (1) the injury must have occurred "in the course of employment" and (2) the injury must have "arise[n] out of... the employment." Frank Escalante, 13 ECAB 160 (1961). See also Bernard D. Blum, 7 ECAB 1 (1947). The Board explained these tests in the matter of George Fenske, Jr., 11 ECAB 471 (1960):

> "In the course of employment" deals primarily with the work setting, the locale and time of the employee's performance of his work assignment; "arising out of the employment" encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. Congress... did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his employment. Liability does not attach merely upon the existence of an employee-employer relationship. Congress... required the showing of a causal connection between a personal injury and the employment.
> Id. at 472 (emphasis added).

In the case at hand, the District of Columbia Court of Appeals correctly ruled that petitioner, a former school teacher, could sue her employer in tort, without first filing a FECA claim, if there was no "substantial question" that the injuries she suffered did not arise out of her employment. However, the Court of Appeals was wrong in ruling that a substantial question as to the applicability of FECA existed in this case, which involved criminal acts unrelated to being a teacher, and committed by strangers.

The applicability of this substantial question rule here requires (1) an analysis of the usual and direct hazards and risks of petitioner's employment as a school teacher, and (2) a determination of whether her having been raped and robbed by intruders was within the "zone of special danger" involved in teaching, or was in any way connected to the hazards of teaching. See Gondeck v.

Pan American World Airways, 382 U.S. 25 (1965); Bailey v. United States, 451 F.2d 963 (5th Cir. 1971); United States v. Udy, 381 F.2d 455 (10th Cir. 1967).

It is petitioner's position, well warranted by the facts and by logic, that her injuries were neither an ordinary hazard of her employment as a school teacher nor the product of any danger which conceivably could be viewed to be within the zone of normal risks of her job.

As a teacher, petitioner came in regular contact with numerous students and other school employees. It is arguable that an attack by one of these individuals could conceivably be a hazard of being a teacher, as would be an attack motivated in some way by petitioner's actions in her classroom.[2/]

However, petitioner was raped and robbed by intruders who were strangers to the school and to petitioner. There was no possible relationship between this bizarre incident and the usual and direct hazards of petitioner's employment as a teacher; being raped by an intruder in the school is not a normal risk incidental to being a teacher — not in any civilized society, at least.

2/ For example, if a friend or relative of a student assaulted a teacher because the student was given a bad grade, this incident might be considered a "usual risk" of teaching.

In ruling that petitioner's injury was within the zone of danger created by her being a teacher, the Court of Appeals relied on cases involving unusual injuries which were non-criminal in nature, e.g., O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), and concluded that "compensation has been awarded for injuries no more job-related than" petitioner's.

However, petitioner's claim is far less connected to her employment than these cases relied on by the Court of Appeals, because the basis of her claim involves unrelated criminal acts. Employment as a teacher may cause an employee to be exposed to unusual circumstances that lead to injury. However, a clear line of ECAB precedent demonstrates that it is inconceivable that under FECA there was a causal connection between being a teacher and being subjected to the brutal criminal acts suffered by petitioner.

For example, in Margaret M. McClain, 23 ECAB 171 (1972), the employee was murdered by his son-in-law, who came to the employee's place of work and shot him. The shooting arose out of a quarrel over a personal matter, and the son-in law was not employed by the deceased's

employer. The ECAB denied relief under FECA and held:

> There is no suggestion that the fatal assault had any relation to the employee's work... the only logical conclusion is that... the employment was not a factor in the assault... [T]he assault did not arise out of the employment and the resulting injury was therefore not compensable.
> Id. at 173.

See also George Fenske, Jr., supra; Jette L. Luellen, 13 ECAB 379 (1962).

The Court of Appeals did not attempt to distinguish these cases, nor did it explain why the present case did not come within the rule established by the ECAB.

B. State Laws and Decisions

State courts consistently have denied workmen's compensation in situations where employees were injured in assaults by strangers, or where the motives for the assaults were unrelated to the employment. Compensation has been denied in these cases because the injuries to the employees in no way could be said to have been caused by the employment; therefore they did not arise out of the employment.

Indeed, state courts are virtually unanimous in holding that in order for an injury to arise out of someone's employment, the injury not only must occur

at the time and place of employment, but also must bear some causal connection to the employment. This causal relationship has been defined by the courts in a variety of ways, but the end result always is the same - benefits for unrelated assaults are denied.

For workmen's compensation coverage to apply, it is not necessary to prove that the precise injury could have been anticipated by the employer; coverage is denied unless the injury was within the zone of risk or hazard incident to the employment, i.e., its terms, conditions, activities, or obligations. For example, in Thornton v. RCA Service Company, Inc., an employee was assaulted by a stranger who made an entirely unprovoked attack upon him during his employment. 221 SW.2d 954 (Tenn. 1949). In upholding the denial of benefits, the Court stated:

> [T]he assault did not arise out of any risk incident to the employment of the party assaulted and was not made because of the employment, or the identity of the employer... There was no causal connection between the nature of Thornton's employment and this assault.
> Id. at 956-7.

See also Hawkins v. Portland Gas Light Company, 43 A.2d 718 (Me. 1945); Math Igler's Casino v. Industrial Commission, 349 Ill. 330, 68 NE.2d 73 (1946).

Other courts borrow from the general principles of the law of torts and require that the employment be a contributing or proximate cause of injury. For instance, in Siebert v. Hoch, an employee who was asleep on his employer's premises was shot and killed by an unknown assailant. The court denied the claim for workmen's compensation because there was no "causal connection" between the death and the employment: "proof of the shooting... by an unknown assailant, for no known reason or motive, without more, fails to meet the statutory requisite that the death arose out of the employment." 199 Kan. 299, 428 P.2d 825, 830-3 (1967). See also Francis v. Liberty Mutual Insurance Co., 85 Ga. App. 225, 97 SE.2d 553 (1957).

Finally, some states require that the motive for the assault relate to the identity of the employer, or to the employer's type of business. See Graham v. Graham, 390 P.2d 892 (Okla. 1964), Thornton v. RCA Service Company, Inc., supra; Hawkins v. Portland Gas Light Company, supra.

CONCLUSION

Based on all these federal and state precedents, it is clear that no causal connection existed between petitioner's employment and her injuries. The District of

Columbia Court of Appeals stands alone in holding that workmen's compensation may be available to an employee in a situation involving an unrelated criminal assault.

In its opinion, the Court of Appeals did not attempt to reconcile its view on the subject with all the opposite views of the ECAB and of the state courts. Its failure to do so is particularly significant because this case involves FECA, a federal statute. It is necessary for this Court to review this case, not only to permit petitioner the resort to the justice system which her case compellingly calls for, but also to establish and apply a uniform standard to all comparable cases arising under FECA and to bring the District of Columbia within the coverage of this standard.

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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July 18, 1979

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Petition for a Writ of Certiorari were mailed, postage pre-paid, this 19th day of July, 1979, to the Office of the Corporation Counsel, District Building, 1350 E Street, N.W., Washington, D.C. 20004.

Ronald L. Goldfarb

Ronald L. Goldfarb

APPENDIX A

STATUTES

5 U.S.C. § 8101. Definitions

For the purpose of this subchapter--

(5) "injury" includes, in addition to injury by accident, a disease proximately caused by the employment, and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices which shall be replaced or repaired, and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired, or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services.

5 U.S.C. § 8102. Compensation for disability or death of employee

(a) The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is —

(1) caused by willful misconduct of the employee;

(2) caused by the employee's intention to bring about the injury or death of himself or of another; or

(3) proximately caused by the intoxication of the injured employee.

5 U.S.C. § 8116. Limitations on right to receive compensation

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee,

his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LYNDA TREDWAY,

Plaintiff

v.

DISTRICT OF COLUMBIA, : Civil Action No. 11257-75

Defendant.

OPINION AND ORDER

This matter comes before the court on defendant's Motion to Dismiss.

Lynda Tredway, a District of Columbia school teacher, filed a complaint for damages on January 6, 1976 alleging negligence by the District of Columbia through its agent, the District of Columbia Board of Education for injuries suffered following her assault, rape and robbery in her classroom on May 5, 1975.

Defendant moved to dismiss and a hearing was held before this court. Defendant's contention is that the plaintiff's exclusive remedy is governed by the provisions of the Federal Employees' Compensation Act, 5 U.S.C. 8101, et. seq., and, accordingly, this court is without jurisdiction.

Finding that the Secretary of Labor is required to be given the primary opportunity to rule on the applicability of the Federal Employees' Compensation Act to the case, this court grants defendant's Motion to Dismiss.

FACTS

The facts of this case are disturbing and undisputed. On May 5, 1975, at approximately 3:00 p.m., plaintiff, Lynda Tredway, was alone in her classroom at the Springarn High School in the District of Columbia. She had just finished talking with and helping a student in her home room class and had begun to grade student papers. Plaintiff was sitting at her desk when, at approximately 3:15 p.m. two men who were neither students at nor employees of the school entered her room, shut and locked the door, tied and gagged her when she screamed, assaulted her with a knife, robbed her and raped her repeatedly.

CONCLUSIONS OF LAW

Plaintiff argues that her injuries are not within the scope of the Federal Employees' Compensation Act (hereinafter FECA), and in the alternative, if her injuries are covered by the F.E.C.A. it is not her sole remedy and, if so, the Act contravenes her Due Process rights under the

Fifth and Fourteenth Amendments of the United States Constitution. Whether plaintiff's injuries are compensable under F.E.C.A. is determinative of her claims. This court is not the proper forum for this determination. "Unless plaintiff's injuries were clearly not compensable under F.E.C.A., we believe that the Secretary of Labor must be given the primary opportunity to rule on the applicability of the Act to this case." Daniels-Lumley v. United States, 113 U. S. App. D. C. 162, 306 F.2d 769 (1962).[1/]

The only decision for this court is whether the facts in this case raise a "substantial question" of coverage under F.E.C.A., United States v. Charles, 130 U. S. App.

1/ The plaintiff declined throughout to secure a decision from the Secretary of Labor although given every opportunity to do so. The District Court stayed the proceedings to allow plaintiff time to secure a determination as to whether her injuries were compensable. The plaintiff failed to do so, therefore, the court dismissed plaintiff's suit without prejudice to pursue her remedies within the Bureau of Employees' Compensation, Department of Labor. The U. S. Court of Appeals affirmed.

D.C. 151, 397 F.2d 712 (1968);[2] Somma v. United States, 283 F.2d 149 (3rd Cir., 1960).[3] If so, the case must

[2] In this case, judgment had already been entered against the United States under the Tort Claims Act and the court vacated and remanded with directions to reinstate judgment if deputy commissioner decided that jurisdiction did not lie under the Longshoremen's and Harbor Workers' Compensation Act.

[3] The court stated, after vacating judgment against the plaintiff who was found contributorily negligent and denied damages under the Federal Tort Claims Act:

> In so deciding, we are not abdicating the functions and responsibility of the court in favor of an administrative agency; rather, we are merely carrying out the obvious intent of Congress when it created the F.E.C.A. That Act sets up a comprehensive system of workmen's compensation for federal employees [and for the District of Columbia as prescribed by statute]. Congress provided that it be interpreted and administered by a Bureau of Employees' Compensation and an Appeals Board whose action is not reviewable by the courts.
>
> . . . Obviously, the purpose in so providing was to insure uniformity of interpretation and policy. Where, as here, admittedly a substantial question of coverage exists, especially in an area in which the Board has not as yet authoritatively spoken, we think it extremely important that it have the opportunity to speak first. at page 151.

be submitted to the Secretary of Labor for determination.

Because of the extraordinary circumstances in this case, this court believes that a "substantial question" of coverage under F.E.C.A. has been raised. This is precisely the type of case contemplated by the court in Daniels-Lumley v. United States, supra, and, therefore, the Secretary of Labor must have the first opportunity to speak on the applicability of F.E.C.A.

The defendant submitted along with its pleadings, an affidavit signed by the Counsel for Federal Employees' Compensation, Office of the Solicitor, United States Department of Labor, stating that he was advised of the plaintiff's injuries, presumably by the defendant, and they are compensable under F.E.C.A. Also submitted was an affidavit by the Superintendent of Schools relating three instances where teachers or school employees were injured by students or outsiders and received benefits pursuant to F.E.C.A. These affadavits do not obviate the need for an official administrative proceeding by the Secretary of Labor or his designees.

Plaintiff argues that if her sole remedy is the F.E.C.A. then her Due Process rights under the Fifth and Fourteenth Amendments of the U. S. Constitution have been violated.

The court cannot, at this time, make a determination as to the merits of this argument. The Secretary of Labor has not made a decision as to the applicability of the statute in this case. Therefore, it would be mere conjecture for this court to entertain the constitutional argument at this time.

WHEREFORE, it is, this 28th day of December, 1977, hereby,

ORDERED, that defendant's (District of Columbia) motion to dismiss be granted without prejudice to proceedings under F.E.C.A., and if jurisdiction does not lie under F.E.C.A., plaintiff's suit will be reinstated.

BY THE COURT:

SAMUEL B. BLOCK, JUDGE

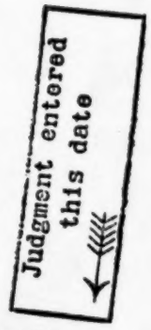
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 13177

LYNDA TREDWAY, APPELLANT,

v.

DISTRICT OF COLUMBIA, et al., APPELLEES.



Appeal from the Superior Court of the District of Columbia

(Hon. Samuel B. Block, Trial Judge)

(Argued September 13, 1978 Decided June 19, 1979)

Ronald L. Goldfarb, with whom *Ronald A. Schechter* was on the brief, for appellant.

Margaret L. Hines, Assistant Corporation Counsel, with whom *John R. Risher, Jr.*, Corporation Counsel at the time the brief was filed, and *Richard W. Barton*, Deputy Corporation Counsel, were on the brief, for appellee.

Before GALLAGHER, HARRIS and MACK, *Associate Judges.*

GALLAGHER, *Associate Judge*: This tort suit presents two questions concerning the interpretation of the Federal Employees' Compensation Act (hereinafter FECA).[1]

[1] 5 U.S.C. §§ 8101 *et seq.* (1976).

The first question is whether the injury suffered by appellant is outside the scope of FECA so that she is not barred by the exclusivity provision[2] of that Act from suing her employer for negligence which allegedly caused her injury.[3] The second is whether there is a "substantial question" that appellant's injury arose while in the performance of her duties, thus requiring her to seek and be denied relief from the Secretary of Labor before she is entitled to sue in tort on the same claim. We hold: (1) that the injuries complained of are within FECA's coverage, and (2) that this case does raise a substantial question as to whether these injuries arose in the performance of duty. Accordingly, we affirm the trial court's dismissal of the complaint.[4]

The facts are not in dispute. Appellant is a District of Columbia school teacher at the Spingarn High School. Her employer, the District of Columbia Board of Education, is an agency of the District government. At about 3:15 p.m. on May 5, 1975, appellant was alone in her classroom grading papers after class. Two male strangers, who were neither students nor employees of the school, entered the classroom, locked the door, and tied and gagged appellant. They assaulted her with a knife, and then robbed and raped her. Appellant alleges that as a result of this attack she experienced humiliation, embarrassment, mental stress, anguish, and pain and suffering, incurred expenses for legal assistance and medical and psychological treatment, and was temporarily unable to perform her duties as a teacher.

[2] 5 U.S.C. § 8116(c) (1976).

[3] This issue was raised in a supplemental brief submitted after oral argument in this case. We granted appellant's motion to file the supplemental brief because our decision in *Mason v. District of Columbia*, D.C.App., 395 A.2d 399 (1978), issued after oral argument here, had a potentially substantial bearing on this case.

[4] This of course permits appellant to proceed under FECA.

She filed her complaint in tort against the District of Columbia alleging that the attack was a direct result of appellee's negligence in failing to provide her with safe working conditions. She alleged that prior similar attacks had occurred and that the school guard was absent when the attack upon her took place. The trial court dismissed the complaint. It ruled that a substantial question of FECA coverage had been raised under the rule stated in *Daniels-Lumley v. United States*, 113 U.S.App.D.C. 162, 306 F.2d 769 (1962). This appeal followed.[5]

I.

FECA requires the government to pay compensation "for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. § 8102(a). Compensation consists of (1) medical services, *id.*, § 8103; (2) vocational rehabilitation, *id.*, § 8104; and payments based on fixed percentages of weekly wages for (3) death, *id.*, § 8102; (4) disability, whether partial or total, temporary or permanent, *id.*, §§ 8105-06; and (5) loss of sense or member, *id.*, § 8107. There is no provision for pain and suffering.

[5] Two affidavits, one by a Labor Department legal counsel and one by the Superintendent of the District of Columbia Public Schools, both to the effect that appellant's injuries were of a type covered by FECA, were received into evidence over appellant's objections. It is not clear how much, if any, weight the trial court gave them in reaching its decision. Since we affirm the trial court without reference to the two affidavits, there is no need to consider here the propriety of the trial court's acceptance of them under Super. Ct. Civ. R. 56(e) or otherwise.

FECA further provides that the liability it imposes is the government's *exclusive* liability *"with respect to the injury* or death of [the] employee." *Id.*, § 8116(c) (emphasis supplied). This provision serves a major purpose of the Act—namely, to limit the government's liability to a low enough level so that *all* injured employees can be paid some reasonable level of compensation for a wide range of job-related injuries, regardless of fault. *See Busey v. Washington*, 225 F. Supp. 416, 422 (D.D.C. 1964). As the legislative history of this provision states:

> Thus [by adding the exclusivity provision to FECA], . . . [t]he savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill. [S. REP. No. 886, 81st Cong., 1st Sess. 23 (1949).]

This provision, however, has been construed as limiting the government's tort liability only for injury or death within the scope of the Act. Thus, an injured employee may sue his employer where the injury is not of the type intended to be covered by the compensation act, *Mason v. District of Columbia*, D.C.App., 395 A.2d 399, 403 (1978), or where the injury was not sustained "while in the performance of his duty." *See Bailey v. United States*, 451 F.2d 963, 967 (5th Cir. 1971); *United States v. Udy*, 381 F.2d 455, 458 (10th Cir. 1967). On the other hand, if the injury *is* covered by the Act, the general rule is that the compensation act remedy is exclusive, even though under the facts of the particular case no compensation is payable[6] or even though the compen-

[6] *E.g., Hubbard v. Reynolds Metals Co.*, 482 F.2d 63, 64 (9th Cir. 1973); *Grice v. Suwannee Lumber Mfg. Co.*, 113

sation act fails to provide for the full extent of the employee's damages. *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345, 350 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967).

Physical attacks by third parties sustained in the performance of the employee's duties are clearly covered by FECA. *E.g., Penker Construction Co. v. Cardillo*, 73 App.D.C. 168, 169, 118 F.2d 14, 15 (1941); *Hartford Accident & Indemnity Co. v. Cardillo*, 72 App. D.C. 52, 55, 112 F.2d 11, 14, *cert. denied*, 310 U.S. 649 (1940); *Hartford Accident & Indemnity Co. v. Hoage*, 66 App.D.C. 160, 85 F.2d 417 (1936). In her supplemental brief, however, appellant contends that her injury is outside the coverage of FECA because she is claiming for humiliation, mental anguish, pain and suffering, and the like. She argues that the *Mason* decision, in which we allowed a plaintiff claiming similar "psychic" injuries to sue her employer, requires that this tort suit be permitted. This argument is without merit. The *Mason* decision does not change the rule that there can be no separate recovery for pain and suffering where the underlying injury is covered by the Act. *Haynes v. Rederi A/S Aladdin, supra* at 350.[7] Rather, *Mason* involved

So.2d 742, 746 (Fla. Dist. Ct. App. 1959); *Blue Bell Globe Mfg. Co. v. Baird*, 64 Ga. App. 347, 13 S.E.2d 105, 106 (1941).

[7] Addressing the injured employee's argument that he should be entitled to tort damages for pain and suffering in addition to compensation, the court in *Haynes, supra* at 350, stated:

> [Appellant's] analysis is so bizarre and unsupportable as to require very little rebuttal. Suffice it to say that appellant completely misconceives the purpose and function of the [compensation] Act; the whole theory of the Act, and of similar compensation legislation, is to provide

injuries which we held were *not* covered by FECA, namely false arrest and false imprisonment. "The gist of any complaint for false arrest or false imprisonment is an unlawful detention," *Clarke v. District of Columbia*, D.C. App., 311 A.2d 508, 511 (1973), "irrespective of any physical or mental harm." *Moore v. Federal Department Stores, Inc.*, 33 Mich. App. 556, ——, 190 N.W.2d 262, 264 (1971); *see Clarke, supra.* Since FECA has been interpreted to encompass only mental[8] or physical[9] injuries, this was not the kind of personal injury covered by FECA. Appellant, however, has alleged physical injuries. The underlying cause of her psychic damages is thus covered by FECA. *Mason* therefore does not apply, and suit is barred even though the compensation act remedy fails to provide for the full extent of her damages. *Haynes v. Rederi A/S Aladdin, supra.*

II.

As we noted earlier, the exclusivity provision of FECA will not bar this tort claim unless the injury was sustained in the performance of appellant's duties. It has been held, however, that in the interest of uniform application of FECA, a court must dismiss a suit to allow the Secretary of Labor to decide whether the injury is compensable under the Act if there is a "substantial question" that the injury arose out of employment. *Somma v. United States*, 283 F.2d 149, 151 (3d Cir. 1960). A substantial question will exist "unless [the] injuries were *clearly* not compensable under the FECA . . . ." *Daniels-Lumley v. United States, supra* at 163, 306 F.2d at 769 (emphasis supplied). This rule is necessary to meet the statutory provision that "all questions arising under" the Act shall be decided by the Secretary of Labor. 5 U.S.C. § 8145; *see Somma v. United States, supra* at 151.

Appellant's argument that there is no substantial question of FECA coverage is based on the absence of a causal connection between her type of employment and the type of injury suffered. While it is true that such a causal relation is required under many state workmen's compensation acts,[10] the rule under the federal compensation acts has been much more liberal to employees. Under both FECA and the Longshoremen's and Harbor Workers' Compensation Act,[11] the causal test has required only that "the work [bring] the worker within the orbit of whatever dangers the environment affords." *Hartford Accident & Indemnity Co. v. Cardillo, supra* at 55, 112 F.2d at 14. Another frequently applied test has been whether the work placed the employee in the particular "zone of special danger" which caused the injury. *Gondeck v.*

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the injured workman with certain and absolute benefits in lieu of *all* common law damages. Thus the payments made by [the insurance company] were made in place of *all* damages to which appellant otherwise would be entitled, and not just lost wages or medical expenses. [Emphasis in original; footnote omitted.]

[8] *E.g., Butler v. District Parking Management*, 124 U.S. App.D.C. 195, 363 F.2d 682 (1966); *Urban Land Inst. v. Garrell*, 346 F. Supp. 699 (D.D.C. 1972); *District of Columbia Transit System, Inc. v. Massey*, 260 F. Supp. 310 (D.D.C. 1966), *rev'd in part on other grounds*, 128 U.S.App.D.C. 328, 388 F.2d 584 (1967).

[9] *E.g., Penker Constr. Co. v. Cardillo, supra; Hartford Accident & Indemnity Co. v. Cardillo, supra; Hartford Accident & Indemnity Co. v. Hoage, supra.*

[10] *See, e.g., Hartford Accident & Indemnity Co. v. Cox*, 101 Ga. App. 789, 115 S.E.2d 452 (1960); *Math Igler's Casino v. Industrial Comm'n*, 394 Ill. 330, 68 N.E.2d 778 (1946); *Siebert v. Hoch*, 199 Kan. 299, 428 P.2d 825 (1967).

[11] 33 U.S.C. §§ 901 *et seq.* (1976).

Pan American World Airways, 382 U.S. 25, 27 (1965); *O'Keefe v. Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359, 362 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951). These cases establish that FECA coverage cannot be denied on the grounds that the injury was not an inherent risk or hazard of the type of job. All that is required is that the injury result from a risk incidental to the environment in which the employment places the claimant.

We note that compensation has been allowed for injuries scarcely more job-related than those in the present case. In *O'Leary, supra*, the employee had drowned while attempting to save swimmers at his employer's recreation center. The center was situated next to a very dangerous channel. Although the employee's job responsibilities had nothing to do with the center or with rescue, the Supreme Court allowed compensation. In *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Adler*, 119 U.S.App.D.C. 274, 340 F.2d 799 (1964), a union official was compensated where, as an alternate to a union convention, he slipped and injured himself in the bathtub of his hotel room while preparing to attend the convention banquet. The claimant in *United States v. Charles*, 130 U.S.App.D.C. 151, 397 F.2d 712, *cert. denied*, 393 U.S. 897 (1968), was allowed compensation for injuries suffered when she fell while alighting from a bus on her way to work, the accident occurring within one block of the officer's club where she was employed. And an assault was compensated in *Hartford Accident & Indemnity Co. v. Hoage, supra*, where the claimant, a cook in a restaurant, was injured when a crazed stranger stuck a knife into the chef's nose while the chef was cooking.

Appellant was in her classroom during her work hours and was acting in the course of her employment when the

attack occurred.[12] The "zone of danger" was not created by appellant; rather, appellant has alleged that the Spingarn High School had been the scene of three previous similar attacks on women teachers. In this situation it is not unlikely that the Secretary of Labor will find that the risk of attack was incidental to the environment in which appellant's job placed her. Compensation has been awarded for injuries no more job-related than those here. We conclude the Secretary of Labor must be allowed to "make the initial determination of coverage to promote uniformity in the application of FECA." *Reep v. United States*, 557 F.2d 204, 208 (9th Cir. 1977).

Affirmed.

[12] This case, therefore, is not governed by the "military base" cases cited by appellant. *See, e.g., Bailey v. United States, supra; United States v. Udy, supra; United States v. Browning*, 359 F.2d 937 (10th Cir. 1966). The courts in those cases ruled that the mere fact that an injury occurs on a military base where a civilian claimant's job is located is not enough to create a substantial question of FECA coverage where the claimants were injured off their job sites long after they had left work to go home. Here, of course, appellant was injured *during* work hours *at* her place of employment. Her injuries are therefore more job-related than those in the cases cited.